

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 KELLY BOLDING, MICHAEL MANFREDI,
11 and SARAH WARD, individually and on behalf
of all others similarly situated,

Plaintiffs,

V.

14 | BANNER BANK, a Washington Corporation,

Defendant.

No. C17-0601-RSL

DEFENDANT BANNER BANK'S
OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL
DISCOVERY RESPONSES

Note on Motion Calendar:
August 10, 2018

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I. INTRODUCTION

Plaintiffs' motion to compel is unnecessary and unfounded. Before Plaintiffs filed their motion, Banner Bank ("Banner") spent months addressing Plaintiffs' wide-ranging discovery concerns, and had already agreed to produce the documents Plaintiffs now seek to compel. Banner had also explained why it no longer had certain documents. Rather than allow Banner to fulfill its promise to provide the requested documents or finish document preservation discussions, Plaintiffs unilaterally terminated the parties' discovery-dispute resolution efforts by filing their motion to compel. The Court should deny that motion for several reasons.

First, before Plaintiffs filed their motion, Banner had already agreed to produce all available Outlook calendars and emails for the named and opt-in plaintiffs. Plaintiffs' motion was therefore, at best, premature, and they failed their obligation to meet and confer in good faith to resolve the dispute without judicial intervention.

Second, Plaintiffs' request for an evidentiary hearing on Banner's document preservation efforts lacks merit. Banner has taken reasonable and proportional efforts to preserve relevant documents. And the small volume of documents that were not preserved are of questionable (if any) relevance and do not materially affect Plaintiffs' ability to present their case.

Third, Banner diligently searched for and produced all responsive training documents. Banner cannot be compelled to produce documents it does not have.

II. FACTUAL BACKGROUND

A. Plaintiffs File a Putative Class and Collective Action Against Banner

Plaintiffs served Banner with their Complaint on April 21, 2017. *See* Dkt. 5. The Complaint alleged Banner failed to properly pay Plaintiffs and other mortgage loan officers (“MLOs”) overtime, and asserted putative collective claims under the Fair Labor Standards Act and putative class claims under various state wage-and-hour laws. *See* Dkt. 1. Banner promptly issued a litigation hold notice and distributed it to key personnel, including its Information Security Department. Peterson Decl. ¶ 4. In the following weeks, Banner began preserving all incoming and outgoing emails from many current MLOs and also took snapshots of individual

1 Outlook accounts of several current MLOs, MLO managers, and key HR and payroll employees.¹

2 *Id.* ¶¶ 5-7.

3 The parties conferred under Fed. R. Civ. P. 26(f) and filed their Combined Joint Status
 4 Report and Discovery Plan on July 10, 2017. Dkt. 14. Plaintiffs did not identify comprehensive
 5 MLO Outlook calendars or complete email accounts as subjects of anticipated discovery. Dkt. 14
 6 at 6:2-12. And although Plaintiffs made passing reference to the need to preserve emails “that
 7 reflect the actual time MLOs and RLs worked,” they made no mention of Outlook calendars and
 8 did not suggest they would seek complete email accounts for all MLOs. *Id.* at 7.

9 **B. Plaintiffs' First Set of Discovery Requests to Banner**

10 On October 13, 2017, Plaintiffs served Banner with their first set of written discovery
 11 requests (“First Discovery Requests”). Williams Decl. ¶ 2, Ex. A. While the volume and breadth
 12 of those requests were staggering, comprising 58 requests for production and 18 interrogatories,
 13 only three of the five requests for production to which Plaintiffs seek to compel responses were
 14 included in those requests. *Id.* Specifically, Plaintiffs requested:

- 15 • “[T]he complete Outlook or other work-related calendars and schedules for all [employees
 16 who worked as Mortgage Loan Officers since April 17, 2014].” Dkt. 100-1 at 10 (RFP
 No. B);
- 17 • “[A]ll documents, which relate to, support, refute, or memorialize Defendant’s [methods
 18 for tracking, recording and calculating the total hours worked by Mortgage Loan
 Officers], including but not limited to, policies, procedures, emails to Plaintiffs, managers,
 19 or any other person regarding your time keeping procedures.”² *Id.* at 12-13 (RFP No. J);
 and
- 20 • “[A]ll documents, which relate to, support, refute, or memorialize [trainings relating to
 21 recording and payment of overtime for Mortgage Loan Officers], including but not limited
 22 to, all documents, materials, policies, procedures and communications (including email
 communications) relating to each training.” *Id.* at 15-16 (RFP MM).

23 Banner timely served objections and responses to Plaintiffs’ First Discovery Requests on
 24 November 13, 2017. Dkt. 100-1 at 10. As to Plaintiffs’ request for all MLO calendars, Banner
 25 objected that no class or collective had been certified and limited its response to Named Plaintiffs

26 ¹ This process is referred to as “journaling,” and involves copying incoming and outgoing email to a separate journal
 27 mailbox, which are then downloaded and saved to disks. Peterson Decl. ¶ 6.

² Plaintiffs only seek to compel training-related documents in response to RFP No. J.

1 only. Dkt. 100-1 at 11 (RFP No. B). As to Plaintiffs' request for training materials, Banner
 2 committed to producing responsive documents upon entry of an appropriate protective order and
 3 provided Plaintiffs with a draft stipulated protective order. *Id.* at 13-17 (RFP Nos. J & MM); *see*
 4 *also* Williams Decl. ¶ 3, Ex. B.

5 Although Banner objected to producing comprehensive Outlook calendars for *all* putative
 6 class or collective members, in light of Plaintiffs' discovery request, it took steps to preserve
 7 those documents. Peterson Decl. ¶ 8. Under its ordinary document retention policy, Banner takes
 8 daily and weekly "snapshots" of its employees' Outlook accounts and retains those on back-up
 9 tapes for 90 days. McFarland Decl. ¶ 11. Beginning in January 2018, Banner preserved all MLO
 10 snapshots from October 28, 2017 forward. Peterson Decl. ¶¶ 8, 17.

11 C. The Court Conditionally-Certifies a Collective Action

12 In the six months following Banner's responses to Plaintiffs' First Discovery Requests,
 13 Plaintiffs did not challenge any of Banner's objections. Plaintiffs also did not respond to
 14 Banner's proposed stipulated protective order. During that same period, the Court conditionally
 15 certified a collective action on December 15, 2017. Dkt. 33. Thirty-three MLOs opted in to the
 16 collective action after that. Dkts. 34-48, 51, 53-69.

17 Banner took additional steps to preserve ESI specific to the opt-in plaintiffs. Peterson
 18 Decl. ¶¶ 8, 11, 13, 17. Banner's ordinary retention process preserves all email sent to or from a
 19 company email account (including calendar invitations) for one year. McFarland Decl. ¶ 10.
 20 From November 2017 through July 2018, Banner ran searches to segregate and preserve all
 21 available emails associated with each opt-in plaintiff. Peterson Decl. ¶ 13.

22 D. Plaintiffs First Raise Discovery Issues More than Six Months After Banner 23 Served Its Initial Responses and Objections

24 In a letter dated May 22, 2018—after filing their motion for class certification and less
 25 than two weeks before the deadline for Banner to oppose that motion³—Plaintiffs raised concerns
 26 with Banner's discovery responses for the first time. Dkt. 100-1 at 19-28. Plaintiffs' letter
 27

³ Plaintiff filed their motion for class certification on May 11, 2018. Dkt. No. 71.

1 identified twenty separate alleged “deficiencies” in Banner’s discovery responses. *Id.* Plaintiffs
 2 requested, among many other things, that Banner: (1) produce Outlook calendars “for all
 3 employees”; (2) produce any training materials provided to MLOs regarding time recording or
 4 overtime; and (3) describe its efforts to preserve ESI. Plaintiffs asked Banner to meet and confer
 5 on May 30 (three business days before Banner’s deadline to oppose class certification). *Id.*

6 Banner agreed to hold a discovery conference on June 5, 2018. *See* Williams Decl. ¶ 4,
 7 Ex. C. The parties addressed each of the twenty issues raised in Plaintiffs’ letter, as well as
 8 deposition scheduling and the form of the parties’ stipulated protective order. *See id.* ¶ 5, Ex. D.
 9 During that meeting and through subsequent correspondence, the parties agreed to limit Plaintiffs’
 10 request for Outlook calendars to the named and opt-in plaintiffs only, and Banner agreed to
 11 produce those to the extent they existed. *Id.* Banner also agreed it would disclose to Plaintiffs the
 12 reasons any responsive Outlook calendars were no longer available. *Id.* Finally, Banner agreed
 13 to search for and produce any responsive training documents provided to MLOs regarding time-
 14 keeping or overtime. *Id.*

15 **E. Plaintiffs Serve a Second Set of Discovery Requests Seeking, for the First
 Time, MLO Email Accounts**

16 On June 5, 2018 (the same day as the parties’ first discovery conference), Plaintiffs served
 17 a second set of requests for production (“Second Discovery Requests”) which sought, for the first
 18 time, complete email accounts for all named and opt-in plaintiffs. Dkt. 100-1 at 47 (RFP Nos.
 19 GGG & HHH). Banner timely responded to Plaintiffs’ Second Discovery Requests on July 5 and
 20 agreed that, upon entry of an appropriate protective order, it would produce the requested email
 21 accounts to the extent they could be reasonably located. Dkt. 100-1 at 52.

22 **F. Banner Agrees to Produce or Already Produced the Documents Plaintiffs
 Now Seek to Compel**

23 Throughout June and July, Banner met and conferred several times in an effort resolve
 24 Plaintiffs’ myriad discovery concerns without court intervention. *See* Williams Decl. ¶ 6, Exs. E-
 25 F. Banner ultimately agreed to provide nearly everything Plaintiffs sought, including the
 26 categories of documents at issue in Plaintiffs’ motion. *Id.* ¶ 7, Ex. F. Specifically, in a letter
 27

1 dated on July 20, Banner reiterated that it “is committed to producing any [of the requested]
 2 emails and Outlook calendars to the extent they are available, including by searching backup
 3 tapes,” and agreed to do so by August 10. *Id.* ¶ 8, Ex. F. Banner also extensively searched for all
 4 responsive training documents, which included interviewing MLO managers and human
 5 resources personnel to locate both hard copy and electronic training materials, and conducting
 6 targeted ESI searches. *Id.* ¶¶ 10-11. In fact, Banner already produced over 519 pages of training
 7 materials, including the two specific trainings requested in Plaintiffs’ motion to compel. *Id.* ¶ 9.

8 Moreover, Banner explained to Plaintiffs on several occasions why some of the requested
 9 Outlook calendars and email accounts were unavailable. *See, e.g., id.* ¶ 12, Ex. E. Although
 10 Banner took the position that steps taken to comply with the duty to preserve information are
 11 protected from disclosure, it agreed to review the legal authority Plaintiff provided on the topic
 12 and “report back by July 27th regarding whether Banner will stand on its objection.” *Id.* ¶ 13, Ex.
 13 F.

14 Before Banner could produce the promised Outlook calendars and email accounts, and
 15 before it could report back regarding preservation efforts, Plaintiffs, without notice, unilaterally
 16 cut off the parties’ discussions by filing their motion to compel on July 26, 2018.

17 III. ARGUMENT

18 A. **Banner Has Already Agreed to Produce Available Outlook Calendars and 19 Emails for the Named and Opt-In Plaintiffs.**

20 Plaintiffs’ motion to compel Banner to produce named and opt-in plaintiffs’ Outlook
 21 calendars and emails is a waste of party and judicial resources. Plaintiffs short-circuited the
 22 parties’ efforts to resolve this dispute and ignored Banner’s commitment to providing the very
 23 documents Plaintiffs now seek to compel. Doing so violated both the spirit and letter of the
 24 Court’s order that “all discovery matters are to be resolved by agreement if possible,” Dkt. 15 at
 25 4:13-14, and the related requirement that a party meet and confer “in good faith . . . in an effort to
 26 resolve the dispute without court action, LCR 37(a), both of which are “intended to ensure that
 27 ***only genuine disagreements*** are brought before the Court.” *Mikron Indus., Inc. v. Hurd Windows*

1 & Doors, Inc., 2008 WL 1805727, at *1 (W.D. Wash. Apr. 21, 2008) (emphasis added).

2 Here, Banner has repeatedly affirmed its willingness to comply with Plaintiffs' requests.
 3 Indeed, on July 20—six days before Plaintiffs filed their motion to compel—Banner stated that it
 4 would “produc[e] any emails and Outlook calendars to the extent they are available, including by
 5 searching backup tapes,” and committed to doing so by August 10, 2018.⁴ Williams Decl. ¶ 8,
 6 Ex. F. Despite that agreement, Plaintiffs moved to compel those same documents.

7 This Court's decision in *Khoa Hoang v. Trident Seafoods Corp.*, 2007 WL 2138779
 8 (W.D. Wash. July 23, 2007) (Lasnik, J.) is instructive. In *Khoa Hoang*, after the parties held two
 9 discovery conferences, the plaintiff moved to compel documents that the defendant had agreed to
 10 produce and sought relief on other issues that had been left open for further discussion. *Id.* at *1.
 11 The Court held that the plaintiff failed to satisfy LCR 37's meet and confer requirement,
 12 explaining the rule “would be meaningless if counsel were permitted to file discovery motions
 13 regarding items about which the parties had already agreed just days before.” *Id.* On those
 14 facts—which closely mirror those here—the Court concluded plaintiff's conduct had “wasted the
 15 Court's and defendants' time,” and “increased the cost and vexatiously multiplied the
 16 proceedings.” *Id.* Consequently, the Court sanctioned the plaintiff. *Id.*; see also *InfusAID LLC v.*
 17 *InfuSystem Inc.*, 2018 WL 690996, at *2 (D. Kan. Feb. 2, 2018) (party did not satisfy meet-and-
 18 confer requirement when it filed motion to compel documents that defendant had agreed to
 19 produce and “simply required additional time to respond for what appear to be valid reasons”).

20 Although Plaintiffs are apparently unhappy with the pace at which those emails and
 21 calendars have been produced, their requests seek an enormous volume of data, most of which is
 22 available only through back-up tapes. Banner and its counsel have dedicated (and continue to
 23 dedicate) substantial time to locating, collecting, reviewing, and processing those documents.
 24 Moreover, Banner has also spent the last two months addressing many other discovery issues not
 25 raised in Plaintiffs' motion, which necessarily diverted some of Banner's resources away from

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 27 ⁴ Plaintiffs' motion to compel has further delayed Banner's document production. Because Banner and its counsel
 have been required to divert time and attention to responding to Plaintiffs' motion—rather than collecting and
 reviewing the Outlook calendars and emails—Banner is no longer able to produce those documents by August 10.

1 collecting and producing the available Outlook calendars and email accounts. And Plaintiffs'
 2 concern about the timing of Banner's production is a problem largely of their own making. They
 3 sat idle for more than six months after Banner served its first set of discovery responses before
 4 raising with Banner any of the issues in their motion. Despite characterizing Outlook email
 5 accounts as "key and essential evidence," Dkt. 99 at 2:15, Plaintiffs waited until June 5, 2018,
 6 (***more than a year*** after filing suit) to first request that data. Given that context, Banner's promise
 7 to produce responsive documents by August 10 was reasonable.

8 Plaintiffs' decision to move to compel those documents was unnecessary and conflicts
 9 with the requirement to meet and confer in good faith. Plaintiffs' motion should be denied.

10 **B. Plaintiffs' Request for an Evidentiary Hearing on Banner's Preservation
 11 Efforts Is Unnecessary and Unwarranted.**

12 Plaintiffs' claim Banner has "stonewalled" their efforts to understand the documents
 13 Banner possesses and the efforts it has taken to locate those documents is, at best, dramatically
 14 overstated. To the contrary, Banner has discussed with Plaintiffs the Outlook email accounts and
 15 calendars it possesses and explained why it does not possess some of those documents. And had
 16 Plaintiffs not unilaterally terminated the parties' meet-and-confer efforts, Banner would have
 17 been able to provide additional information instead of diverting its and its counsel's time and
 18 efforts to needless motions practice.⁵ As discussed below, Banner has taken reasonable steps to
 19 preserve relevant evidence.

20 **1. Banner Had No Duty to Preserve Documents Until It Was Served with
 21 the Complaint**

22 Under Banner's ordinary document retention policies, it retains all emails (not calendars)
 23 for one year. McFarland Decl. ¶ 10. Banner also takes daily and monthly snapshots of each
 24 employee's Outlook account and retains those for 90 days. *Id.* at ¶ 11. Banner did not receive
 25 notice of Plaintiffs' claim until it was served with the Complaint on April 21, 2017. As of that

26 ⁵ Given that "[t]he Federal Rules of Civil Procedure, case law, and the Sedona Principles all . . . emphasize that
 27 electronic discovery should be a party-driven process," Plaintiffs' resort to motions practice before exhausting the
 meet-and-confer process is particularly inappropriate. *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109 (E.D. Pa.
 2010).

1 date, Banner (i) no longer possessed any emails for the named or opt-in plaintiffs who had
 2 separated from Banner before April 21, 2016 (with two limited exceptions⁶), and (ii) did not
 3 possess any email snapshots for employees who separated prior to January 21, 2017.⁷ Peterson
 4 Decl. ¶¶ 12, 15. Because those documents were deleted pursuant to Banner's ordinary practice
 5 before it had notice of this litigation, Plaintiffs' spoliation allegations are unfounded.

6 Plaintiffs argue that Banner had a duty to indefinitely preserve those documents stemming
 7 from separate litigation in *Erickson v. AmericanWest Bank*, King Co. Sup. Ct. No. 15-2-01976-7
 8 SEA. Not so. A party's duty to preserve evidence arises only when "a reasonable party in the
 9 same factual circumstances would have reasonably foreseen litigation." *Apple Inc. v. Samsung*
 10 *Elecs. Co.*, 888 F. Supp. 2d 976, 990 (N.D. Cal. 2012); *United States v. Kitsap Physicians Serv.*,
 11 314 F.3d 995, 1001 (9th Cir. 2002) (no duty to preserve where defendant was not on notice of a
 12 "future, specific" lawsuit). Prior litigation generally does not establish free-standing duty to
 13 preserve evidence for the benefit of future plaintiffs. See *Brigham Young Univ. v. Pfizer, Inc.*,
 14 282 F.R.D. 566, 572 (D. Utah 2012) "[A]ny duty [the defendant] owed parties in other litigation
 15 would belong to that party and not [the plaintiff]."⁸ And while some courts have found an
 16 extended a duty to preserve evidence from prior litigation involving substantially similar facts and
 17 allegations, that is not true when the earlier litigation "raise[s] different factual issues . . . [that]
 18 would not have given [the defendant] reasonable notice" of the subsequent action. *In re Pfizer*
 19 *Inc. Sec. Litig.*, 288 F.R.D. 297, 316 (S.D.N.Y. 2013).

20 The *Erickson* litigation bore no resemblance to this case. The *Erickson* plaintiffs asserted
 21

22 ⁶ Banner specifically preserved Bolding's email and snapshots due to her involvement in the *Erickson* litigation,
 23 discussed below. Peterson Decl. ¶ 10, 12. Moreover, Banner produced to Plaintiffs certain specific emails from
 24 certain AWB opt-in plaintiffs that Banner produced during the *Erickson* litigation. Williams Decl. ¶ 14.

25 ⁷ Of the 33 opt-in plaintiffs, 20 left Banner before January 21, 2017 (meaning Banner had no remaining Outlook
 26 snapshots), and nine had left before April 20, 2016 (meaning Banner had no remaining emails). Peterson Decl. ¶¶
 27 12, 15.

28 ⁸ Other cases are in accord. See *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1308 n.10
 29 (N.D. Ga. 2011) (rejecting plaintiff's "sweeping and novel theory" that a government investigation imposes a general
 30 duty to all future potential plaintiffs to preserve documents related to the investigation); *Point Blank Sols., Inc. v.*
 31 *Toyobo Am., Inc.*, 2011 WL 1456029, at *26 (S.D. Fla. Apr. 5, 2011) (defendant's duty of preservation owed to prior
 32 adverse party "do[es] not necessarily mean that [the defendant] should have at that time anticipated litigation with
 33 [the plaintiff] or that [the plaintiff] can take advantage of an evidence-preservation duty owed by [the defendant] to
 34 [the prior adverse party].")

1 individual sexual harassment claims, not class-wide wage-and-hour claims. *See* Williams Decl. ¶
 2 14, Ex. G. Although Ms. Bolding (a non-party to the *Erickson* litigation) testified in her
 3 deposition that her manager allegedly discouraged her from logging overtime, Dkt. 100-1 at 119-
 4 136, those stray comments by a non-party witness in an individual sexual harassment action
 5 hardly qualify as notice that Ms. Bolding or some other MLO would later pursue a collective or
 6 class action for unpaid overtime. And any suggestion the *Erickson* complaint *might* be amended
 7 to add wage claims for two of the several *individuals*, Dkt. 99 at 9:14-16, hardly triggers a
 8 continuing duty to preserve documents relevant to possible *class-wide* wage claims. The Court
 9 should reject Plaintiffs' claim that the *Erickson* litigation "establish[ed] some type of free-floating
 10 or shifting duty which other parties could latch onto" to advance a spoliation argument. *Point*
 11 *Blank Sols., Inc.*, 2011 WL 1456029, at *26.

12 Even if *Erickson* triggered *some* perseveration duty, like all discovery obligations, that
 13 duty "must be measured against the yardstick of proportionality." *Victor Stanley, Inc. v. Creative*
 14 *Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010). At most, Bolding's testimony in *Erickson* may
 15 have triggered a duty to preserve ESI specific to Bolding's potential individual claim (which
 16 Banner did). Peterson Decl. ¶ 10, 12. But it cannot support a duty to preserve all emails and
 17 calendars related to any MLO that ever worked for Banner or AWB, as Plaintiffs argue here.
 18 And, in any case, any duty to preserve stemming from the *Erickson* litigation terminated when
 19 that case was dismissed with prejudice in September 2016, long before this lawsuit began. *See*
 20 *Rabenstein v. Sealift, Inc.*, 18 F. Supp. 3d 343, 362 (E.D.N.Y. 2014) (rejecting plaintiff's
 21 argument that prior litigation triggered preservation duty, stating "any plausible duty to preserve
 22 ended with the [prior litigation settlement]").

23 Simply put, Banner had no ongoing duty to preserve all MLO Outlook email accounts or
 24 calendars as a result of the *Erickson* litigation.

25 **2. Banner Has Preserved ESI Consistent with the Reasonable Needs of
 26 this Case**

27 Since Plaintiffs filed this lawsuit, Banner has taken reasonable steps to preserve relevant

1 evidence, and has regularly revisited and refined those efforts as the case evolved and the
 2 legitimate needs of the parties shifted. *See* Peterson Decl. ¶¶ 5-9. Although the results have not
 3 been perfect, any shortcomings have been both inadvertent and inconsequential.

4 Contrary to Plaintiffs' argument, the duty to preserve does not extend to "every shred of
 5 paper, every e-mail or electronic document, and every backup tape." *Zubulake v. UBS Warburg*
 6 *LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). Rather, the scope of a party's duty to preserve
 7 "depends heavily on the facts and circumstances of each case and cannot be reduced to a
 8 generalized checklist of what is acceptable or unacceptable." *Rimkus Consulting Grp., Inc. v.*
 9 *Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010). "Whether preservation or discovery
 10 conduct is acceptable in a case depends on what is reasonable, and that in turn depends on
 11 whether what was done—or not done—was proportional to that case and consistent with clearly
 12 established applicable standards." *Id.* Moreover, the duty to preserve does not extend to
 13 evidence the opposing party has not requested when its relevance is not readily apparent. *See*
 14 *Otsuka v. Polo Ralph Lauren Corp.*, 2010 WL 366653 at *4 (N.D. Cal. 2010) (in putative class
 15 action related to unpaid overtime, defendant's duty to preserve surveillance footage was not
 16 triggered until plaintiffs specifically requested the footage).

17 Here, Plaintiffs' expectation that Banner preserve every Outlook email and calendar for
 18 each of its nearly 200 MLOs at the outset of the case is unreasonable and disproportionate to the
 19 legitimate needs of this case. At the time the case was filed, in addition to preserving documents
 20 related to the named plaintiffs, Banner collected and preserved other MLO personnel files and
 21 began "journaling" emails to and from current MLOs, and, expanded its "journaling" efforts to
 22 include others who might bear some relationship to the litigation. Peterson Decl. ¶ 6.

23 As the litigation progressed, Banner repeatedly reevaluated and modified its preservation
 24 efforts. After Plaintiffs served a discovery request for complete MLO Outlook calendars in
 25 October 2017—giving notice, for the first time, that Plaintiffs viewed those documents in their
 26 entirety as relevant—Banner began preserving "snapshots" contained on back-up tapes in January
 27 2018. *Id.* ¶¶ 7-8. And after the Court conditionally certified the collective and other employees

1 opted-in over the course of January through April, Banner ran targeted compliance searches for
 2 each opt-in to recover any emails that remained available. *Id.* ¶ 9.

3 To be sure, Banner's efforts have not been flawless. Banner concedes an approximately
 4 three-month gap exists between its receipt of Plaintiffs' calendar request and its preservation of
 5 back-up tapes. *Id.* ¶ 8. As a practical matter, however, that gap was inconsequential, as it only
 6 affected one opt-in plaintiff.⁹ Similarly, while some delay occurred between the dates certain
 7 plaintiffs opted in and the date Banner captured their emails, that delay had minimal effect. Had
 8 Banner conducted compliance searches immediately after each plaintiff opted in, it would have
 9 only saved emails for five opt-in plaintiffs over brief periods of time.¹⁰ Put in context, these were
 10 immaterial lapses that have had a marginal (if any) effect on Plaintiffs' ability to develop their
 11 case.

12 Moreover, the limited probative value of the evidence at issue underscores the
 13 reasonableness of Banner's preservation efforts. At best, the calendars and emails might
 14 potentially provide indirect evidence suggesting that an MLO worked overtime. Indeed, until
 15 very recently, Plaintiffs showed little interest in obtaining the calendars and emails at issue.
 16 Plaintiffs did not identify those documents as anticipated subjects of discovery in the parties'
 17 Combined Joint Status Report and Discovery Plan. Dkt. 14 at 6:2-12. Although Plaintiffs
 18 requested Outlook calendars in October 2017, it waited more than six months (after filing their
 19 motions for conditional certification and class certification) to challenge Defendants' objection to
 20 producing calendars for putative class or collective members. And Plaintiffs did not even request
 21 emails until June 2018, more than a year into this case. Plaintiffs' relative disinterest in the
 22 documents indicates the documents are of little importance to their case. *Northrop Grumman*
 23 *Corp. v. Factory Mut. Ins. Co.*, 2012 WL 12875772, at *6 (C.D. Cal. Aug. 29, 2012) (noting that
 24 the requesting party's "delay itself appears to indicate that the requested emails are of only

25
 26 ⁹ That is, had Banner begun preserving the snapshots immediately upon receiving Plaintiffs' First Discovery Requests, it would have been able to preserve snapshots for only one additional opt-in Plaintiff. Peterson Decl. ¶ 16.

27 ¹⁰ Specifically, Banner would have captured less than three months of emails for four opt-in plaintiffs, and approximately four months for the fifth opt-in plaintiff. *Id.* ¶ 14.

1 marginal relevance to defendant in this action” and “because this discovery was not pursued in a
 2 timely manner, and in light of the substantial amount of relevant documents defendant has already
 3 received from plaintiff during the many years that this case has been litigated, it does not appear
 4 that the requested ESI is essential to the defense of this action”).

5 Accordingly, Banner reasonably discharged its duty to preserve relevant information and,
 6 even if that were not so, any inadvertent loss of documents is inconsequential.¹¹

7 C. Banner Has Produced All Responsive Training Materials

8 Plaintiffs’ motion to compel training documents responsive to RFP Nos. J and MM should
 9 be denied for the simple reason that Banner has, after conducting a diligent search, produced all
 10 responsive documents. Banner has extensively searched for responsive MLO training documents
 11 and produced all documents it has located. Williams Decl. ¶¶ 9-11. In addition to searching for
 12 documents in connection with its initial responses to Plaintiffs’ First Discovery requests, the
 13 parties agreed during the meet-and-confer process that Banner would interview all MLO
 14 managers and human resource personnel to identify any electronic or hard copy training
 15 documents responsive to Plaintiffs’ requests. *Id.* ¶ 10. Banner did so, and also conducted ESI
 16 searches to identify additional documents Plaintiffs specifically requested. *Id.* ¶ 11.

17 Because Banner “cannot be compelled to produce documents which they do not possess,”
 18 Plaintiffs’ motion to compel should be denied. *Watkins v. Baum*, 2013 WL 149870, at *3 (W.D.
 19 Wash. Jan. 14, 2013); *see also Bising v. Taylor*, 2014 WL 7409554, at *11 (S.D. Cal. Dec. 31,
 20 2014) (“The Court cannot compel Defendants to produce documents that they do not possess.”).

21 IV. CONCLUSION

22 For the foregoing reasons, Plaintiffs’ motion should be denied.

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 24
 25 ¹¹ Even if the Court ordered Banner to provide additional information concerning its preservation efforts, an
 26 evidentiary hearing is unnecessary. As the cases Plaintiffs cite illustrate, courts in this district generally require a
 27 party to submit declarations describing preservation efforts rather than hold an evidentiary hearing. *See Moore v.*
Lowe’s Home Centers, LLC, 2016 WL 687111 (W.D. Wash. Feb. 19, 2016) (ordering party to explain preservation
 efforts to opposing party and produce certain retention policy documents); *Ball v. Manalto, Inc.*, 2017 WL 1788425,
 at *1 (W.D. Wash. May 5, 2017) (ordering party to submit declarations describing preservation efforts).

1 DATED this 6th day of August, 2018.

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